New Zealand update

New Zealand media law update

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Introduction

Developments in New Zealand media law have apparently accelerated even more in the last year and a half. In defamation, the New Zealand courts remain unsure whether hyperlinking to a defamatory article can amount to publishing that article. However, it seems active administration of a webpage focused on particular issues can amount to publication of what is said about those issues, whether by the administrator or third parties. Helpfully, the Court of Appeal has made it very clear that a publisher of third party online comments cannot be liable for those comments unless there is actual knowledge of the existence of the comments and there has been reasonable time to remove them. Further decisions from the High Court indicate a willingness to develop a public interest defence, although no successful cases have arisen on the facts as yet. Furthermore, it appears it may be more difficult to establish there is a public interest defence for comments made on online single issue discussion forums.

In breach of confidence, a prominent blogger obtained an interim injunction to prevent disclosure of thousands of his emails and other online discussion by a hacker, but was unable to prevent the media from using information already leaked. A government body obtained a permanent injunction preventing a man from disclosing a spreadsheet of material related to thousands of earthquake-damaged Christchurch properties. When the man defied the injunction, he was fined for contempt. Maori television faced difficulties establishing a public interest defence in a proposed programme in interim injunction proceedings but the action was dropped and media ultimately obtained access to affidavit evidence produced for the proceedings.

In privacy, a further case confirmed that it is difficult for applicants for interim injunctions to establish potential harm arising from anticipated stories where there is no evidence as to actual content. A further case in the High Court muddied the waters in the development of the new intrusion into seclusion tort, while in another case, an interim injunction was granted. A journalist was held not to be covered by the media exemption in the Privacy Act 1993 in relation to gathering material for a book. The Court of Appeal confirmed that breach of an historic suppression order by a website could be the subject of a successful complaint to the Privacy Commissioner under the Privacy Act.

In the area of official information, the government confirmed it will not move forward with major reform of the Official Information regime suggested by the Law Commission. However, a recent political scandal suggests political manipulation of the regime is possible and at the least, there is a

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serious lack of appropriate process and protocols at the highest level. The government also decided not to proceed with recommendations by the Law Commission to develop one body to deal with regulation of media in New Zealand. We now have a confusing three part system with different codes and complaints processes.

Media continue to seek access to court records, testing the new regimes and guidelines now in place. In general, the principle of open justice is balanced as one factor in the process. Media tend not to be successful when they make premature applications at a very early stage in the court process. As to filming in court, media guidelines are currently being reviewed. During this process, TV3 grossly breached the current guidelines by broadcasting footage that should not have been captured during a prominent trial and using it as a 'sideshow'. In court reporting, the High Court in Christchurch made a set of suppression orders that had a rare blanketing effect on the proceedings, and are likely to be challenged by media. The Court of Appeal confirmed the existence of an inherent power to suppress names and evidence.

In contempt, a man was found liable for hyperlinking to information in breach of a permanent injunction. The Law Commission issued an extensive Issues Paper on the reform of the law of contempt, in which it suggested a specific and limited statutory approach to sub judice contempt backed up by appropriate offences, removal of scandalising the court from the law, and specific regimes of education and strengthened instructions to jurors together with appropriate offences.

The Broadcasting Standards Authority continued to uphold fewer complaints and to impose no penalty in at least half of its decisions. Some of its decisions struggled with reality programming and the arrival of 'satirical' news. The Press Council's uphold rate dropped rather dramatically to nearer its historical average of about 15%. The Council has made membership available to non-newspaper digital media. The new Online Media Standards Authority reached its first full decision (which was declined) and opened its membership to two bloggers in addition to the original membership of broadcasters with an online presence.

Finally, a prominent investigative journalist was subject to an extensive warranted search under New Zealand's new Search and Surveillance legislation. He has claimed source privilege for all the material removed from the premises and is challenging the validity and execution of the warrant.

Defamation

Liability as a publisher on the internet

In a recent case involving author and public figure, Joe Karam, Karam sued media over comments on two websites which he pleaded suggested he lacked integrity and behaved improperly by supporting David Bain, a man who was acquitted of the murder of his family in a prominent retrial.[1] Four articles in newspapers and on media websites referred to an ongoing debate about the acquittal and to statements made on a Facebook group and on another website.

1 *Karam v Fairfax New Zealand Ltd*, High Court, Auckland, CIV-2010-404-005021, Associate Judge Osborne, 10 May 2012.

The media articles generally did not repeat what was said on the sites, but contained hyperlinks to them and to an online petition. The creator of one of the sites was also quoted.

The court rejected an application by media for separate consideration of the question of publication arising from hyperlinks. Fairfax referred to the recent Canadian decision of *Crookes v Newton* to suggest that on the matter of hyperlinks New Zealand law was clear and the claim should fall away. In *Crookes*, the Supreme Court of Canada refused to find publication,[2] at least in relation to the inclusion of both deep and shallow hyperlinks in an online article to websites containing allegedly defamatory material, likening hyperlinks to footnotes. However, in *Karam* the New Zealand High Court did not agree that New Zealand law will inevitably follow *Crookes*, so the question remains open. Therefore media hyperlinking in a story to a website containing defamatory material may amount to media actually publishing what is on the website.

In *Karam v Parker*,[3] Karam sued individuals for comments made on Facebook, a website called Counterspin, Trademe and YouTube, suggesting he was dishonest, fraudulent and lacking in integrity in relation to his support of David Bain. Courtney J rejected an attempt by Mr Parker to argue that he was merely an innocent disseminator under s 21 of the Defamation Act. Mr Parker was a publisher because he was an active group administrator of the Facebook page. He edited and removed comments and warned other posters about not posting defamatory material. He eventually resigned as administrator when matters got beyond his control but even after that point, continued in some aspects of the role. Further, he had more control over the Counterspin website which he set up as a moderated forum to tell what he saw as the other side of the Bain retrial and its outcome. Due to the active control he exercised on both sites, the judge found Mr Parker could not use an innocent dissemination defence and could be liable for his own posts and those of third parties published on the sites. The High Court made ex-All Black, businessman and writer Joe Karam a total award of $525,000, being $340,500 compensatory damages apportioned to the main defendant Mr Parker, and $184,500 to a Mr Purkiss. The damages were for approximately 50 statements published online. Justice Courtney held that the level of seriousness of the defamatory statements suggested Mr Karam was dishonest, fraudulent and lacking in integrity. She also awarded $10,000 in punitive damages and indemnity costs. Notably, Mr Parker represented himself in the case and Mr Purkiss did not appear at all. The award demonstrates how numerous publications online can significantly increase damages awards.

In *Wishart v Murray*[4] allegedly defamatory comments by anonymous third parties were posted on a Facebook page established by the defendant, who had also used Twitter to publicise the page. The page was set up to discuss the impending release of a book co-authored by the plaintiff and the mother of

2 *Crookes v Newton* 2011 SCC 47, [2011] 3 SCR 269. The Supreme Court held that by themselves, hyperlinks can never amount to publication, as to apply such a rule would make those using hyperlinks presumptively liable and this would chill freedom of expression on the internet.

3 *Karam v Parker* [2014] NZHC 737.

4 Discussed previously, [2013] NZHC 540, [2013] 3 NZLR 246.

twins who died from non-accidental injuries in 2006 and whose killer was never identified. The defendant argued the part of the claim relating to the anonymous posts by third parties should be struck out because as the mere host of the Facebook page, he was not a publisher. In the High Court, Courtney J thought that such hosts will be publishers of anonymous postings in two situations:

- where they know about the defamatory statement and fail to remove it within a reasonable time such that it can be inferred they are taking responsibility for the statement (the 'actual knowledge and failure to act test'); or
- where they do not know, but ought to, that defamatory statements are likely in the circumstances (the 'imputed knowledge test').[5]

However, on appeal, the Court of Appeal rejected the second limb of this approach, holding that a publisher would be required to have actual knowledge.[6] The court had numerous concerns which caused it to take this position. First, it considered that an 'ought to know' test places a web host who does not know of the defamatory comment in a worse position than a host who actually does know, because the latter does not become a publisher until a reasonable time for removal of the statement has passed and will not be a publisher at all if the statement is removed in a reasonable time. In contrast, a host lacking knowledge would be a publisher from the moment of posting but is unable to avoid that outcome by removing the comment. This could be seen as a form of strict liability, or liability based on a form of negligence. The court was of the view that this goes against the character of defamation as an intentional tort. Further, an 'ought to know' test could be in breach of the New Zealand Bill of Rights Act requirement in s 14 to balance the right to reputation against freedom of expression, tipping the balance too far in favour of reputation. The imputed knowledge test was also seen as too uncertain, and finally, a web host would probably not have access to an innocent dissemination defence if found to be a publisher. The requirement for publication in these circumstances is therefore a test of actual knowledge, with the opportunity to escape liability by removing the offending material within a reasonable time.

Development of public interest defence

Dooley v Smith[7] discussed previously, has been appealed to the Court of Appeal and it was hoped a higher court might endorse the expansion of New Zealand's constitutional qualified privilege defence into a full public interest defence. It will be recalled that the New Zealand defence currently protects discussion of MPs, past, present or future. The issue was completely side-stepped by the Court of Appeal in *Dooley*, however, because the court found all the statements involved were not actually defamatory to begin with, so no defence was needed. This meant the matter of whether the defence could be expanded was left for another day, although the Court of Appeal certainly

5 *Wishart v Murray* [2013] NZHC 540, [2013] 3 NZLR 246 at [117].
6 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.
7 [2012] NZHC 529; *Smith v Dooley* [2013] NZCA 428; *Dooley v Smith* [2013] NZSC 155.

did not close this issue down.[8] Frustratingly, *Dooley* did not clarify matters a great deal. However, it did show that a further High Court judge is prepared to expand the defence and that the Court of Appeal is open to argument about the issue.

Other High Court cases continue to develop the law. In October 2013, a further decision emerged from the High Court which supports expansion of constitutional qualified privilege. *Cabral v Beacon Printing & Publishing*[9] involved a claim against the Whakatane Beacon newspaper and an individual journalist. The Beacon published an article about a local development project which the plaintiff was involved in funding, in the course of which it disclosed details of old overseas convictions of the plaintiff and mentioned investigations into alleged misuse of funds by trustees of a connected trust. The plaintiff argued the inclusion of this information in the article gave an inaccurate defamatory impression of her. In an application to strike out the defence the court felt it had sufficient information before it to decide that qualified privilege was unavailable. This was not because the article was not about an MP, but because it was not of sufficient public interest. In other words, the court treated the defence as one on public interest, but found it could not apply to the facts because the published story was not in fact a public interest story.

In expanding the subject matter of the defence, the court said 'there may be other matters of public interest, for which the media may properly invoke the privilege'. The Court of Appeal recognised this in *Lange v Atkinson*.[10] However, it then went on to point out that matters of general interest alone will not be of sufficient public interest.[11] The court found the article here was of local interest, it touched on matters in which some local people were involved including payment of monies, and as such, it was newsworthy. But this was not the same as public interest. That required something more – something so important that it entitled the defendants to tell the readers about it even though it defamed the plaintiff and was not true.[12] *Cabral* suggests two important things about the developing defence – first, it can extend to matters of public interest, but second, the threshold for a story to cross into public interest is quite high. It is perhaps surprising that the story in *Cabral* did not cross the threshold. The story appears more than newsworthy and also comparable to overseas cases where public interest stories have been found to exist.[13] A public interest defence will be of limited use if the question of what is in the public interest is defined narrowly, as has happened in Australia where the

8 *Smith v Dooley* [2013] NZCA 428 at [74]. An attempted appeal to the Supreme Court, failed on the grounds that the differences between the High Court and the Court of Appeal judgments amounted to matters of fact, which would not be revisited on appeal: *Dooley v Smith* [2013] NZSC 155 at [4].

9 [2013] NZHC 2684.

10 Ibid at [28]; *Lange v Atkinson* [1998] 3 NZLR 424 at 445.

11 Ibid at [29].

12 Ibid.

13 Eg, in the English case, *GKR Karate (UK) Limited v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931, [2000] 1 WLR 2571, a public interest defence was successful in relation to a story in a weekly, free community newspaper that was distributed to 158,000 houses and businesses in the Leeds area discussing the issue of the local selling of karate lessons door to door.

defence is confined to government or political matters and has to be linked to the constitutional system of representative government.[14]

Cabral has been followed by a slightly more cautious decision of the High Court in *Karam v Parker*,[15] where Courtney J ruled that the defence did not extend to protect statements made online about well-known sportsman, businessman and writer, Joe Karam. The judge accepted the possibility of extension of the defence and noted that discussion of local government issues might be within the idea of political expression, but concluded it would be going too far to also include statements posted on websites established to facilitate the free exchange of ideas on matters that interest members of the public.[16] The court differentiated between mainstream media and new media, implying that the latter will find it difficult to claim the defence. Facebook is described in the judgment as facilitating the mere exchange of views rather than making available to the public information that is not readily available as traditional media do.[17] Further, the court considered that although the defendant had set up a website called Counterspin as a vehicle to publically express his views about the David Bain case, it did not appear to give rise to a duty to do so. It is arguable the High Court in *Karam v Parker*[18] took too restrictive an approach to possible expansion of the defence. To focus on a need for a duty/interest relationship is seemingly misplaced. The *Lange* defence defined the subject matter to which it could apply, meaning that if the subject matter is right, then the duty/interest relationship is taken to exist even for information that is published to a mass audience. Furthermore, in favouring traditional media over new media, the decision sidelines the increasingly important public interest functions of new media.

This growing body of High Court decisions suggesting openness to a public interest defence is yet to be tested by a superior court. However, the law appears to be consolidating around the issue, with public interest defences being filed in response to new claims.

A further challenging issue is that the defence can be lost by ill will or taking improper advantage of the occasion of publication.[19] In *Smith v Dooley*[20] the Court of Appeal dealt with ill will and taking improper advantage separately, as required by case law.[21] It found that letters to media and opposition to the way a special trust was being run were not evidence of ill will, but of genuine concern about governance, while the fact that the defendant had taken care to check the facts before authorising a newspaper to publish his comments meant there had been no recklessness and hence no taking improper advantage.

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14 Eg, *Popovic v Herald and Weekly Times* [2003] VSCA 161, (2003) 9 VR 1 (although there was a difference of opinion on the point in the Court of Appeal).
15 [2014] NZHC 737.
16 Ibid at [210].
17 Ibid at [211] – [212].
18 [2014] NZHC 737.
19 Defamation Act 1992, s 19.
20 [2013] NZCA 428 at [73]-[91], See also *Du Claire v Palmer*[2012] NZHC 934 at [120]-[123].
21 *Lange v Atkinson* [2000] 3 NZLR 385.

In *Karam v Parker*,[22] the High Court considered whether, if the constitutional qualified privilege defence had been available, it would have been lost due to ill will or improper use. Courtney J found against Mr Parker and suggested that the nature of publication in new media may give rise to a need for greater responsibility due to the ability to publish widely and indefinitely and to manipulate accessibility, such as by formatting a site to give prominence in Google search results, as Mr Parker stated he had done. The implication of this finding is that it will be harder to those in Mr Parker's shoes to show they have not misused the opportunity to publish online.

Honest opinion and statements published online

In *Karam v Fairfax New Zealand Limited*,[23] where the newspaper published a story containing links to an allegedly defamatory website, the court recognised that extremely odd or biased views will be opinions for the purpose of a defence, provided the media defendant has no reasonable cause to believe the opinions are not genuinely held. Thus, the opinion may be unusual, extreme or damaging, but the defendant need not prove the opinion was in fact a genuine opinion, only that there was reasonable cause to believe this was so. Since in this case, any opinion involved was that of the website creators and not the media, Fairfax had to show the opinion was not its own and there was nothing to alert it to the possibility that it was not the genuine opinion of the author.[24] The judge took a broader approach to the pleaded facts than that suggested by the claimant in this action to strike out the defence, and held that using the facts in its pleaded schedule, Fairfax might able to prove it had no reasonable cause to believe that the opinion was not the genuine opinion of the authors.

Qualified privilege for fair and accurate reports of court proceeding

In *Rafiq v Google New Zealand Ltd*[25] verbatim reproduction of excerpts of a judgment on a blog post were held likely to be covered by the qualified privilege for accurate reports of court proceedings defence. The blog quoted exact passages in a decision of the Human Rights Review Tribunal. While it did not reproduce the entire judgment, the court accepted the context of the blog did not produce an inaccurate effect and the report could not be seen as unfair.

Breach of confidence

Computer hacking

In *Slater v APN New Zealand Ltd*[26] the High Court granted an injunction to prominent blogger Cameron Slater under a claim in both privacy and breach

22 [2014] NZHC 737.
23 [2012] NZHC 887 at [47]-[49].
24 Defamation Act 1992, s 10(2)(b).
25 [2014] NZHC 551 at [21]. The decision was on a preliminary application for security for costs.
26 [2014] NZHC 2157.

of confidence, to prevent unknown persons from publishing his email correspondence obtained by illegal computer hacking. However, media which had received information from the hacker and had not been involved in the hacking were not restrained from publishing any information they already held. Slater later abandoned the claim against media after receiving an undertaking not to publish any of the material in which there was no genuine public interest – this was stated by the court to cover information about the plaintiff's wife and children, his medical records, the death of his mother and information of a similar nature.

Interim injunction

Further to previous discussion of a case where the Earthquake Commission (EQC) obtained an interim injunction prohibiting the publication of information released by accident which contained details of repair plans and estimates for repair costs for thousands of Christchurch homes,[27] the Commission has successfully obtained a permanent injunction against the blogger who made the information available online after he outed himself. In *Earthquake Commission v Krieger*[28] the court applied a qualification of the rule that where government wants to take advantage of the protections offered by the private law of confidence, it must prove the public interest justifies this. It did this by asking first, whether EQC was close enough to core government activity to be equated with government, and second, was the nature of the information in question such that there would be no need for EQC to establish public interest in restraining it.

The court answered the first question in the affirmative by looking at EQC's role as a Crown agent under the Crown Entities Act 2004 and at its board membership and accountability to a Minister. It found EQC is not a government department but it is an integral part of central government. On the second question, the court used the views of the Chief Ombudsman in a 2012 ruling that EQC did not have to disclose estimated repair costs to a claimant[29] to hold that the spreadsheet simply contained ordinary commercially sensitive information, as well as private information about claimants. The court concluded the information was therefore not information 'relating to government' which carried an onus of establishing that restraint would be into the public interest.

It is unclear this apparently new qualification is a real one, or what purpose it serves. This is because arguably there is very high public interest in government restraining publication of commercially sensitive information and private information it has collected. In the first category of information, the reason it is commercially sensitive at all is because it directly impacts on how much public tax revenue will need to be expended. That is not like private sector commercial sensitivity. In the second category, private information does not cease to be private because it is collected and held by a government, but in being held, it becomes government–related because the government

27 *Earthquake Commission v Unknown Defendants* [2013] NZHC 708.
28 [2014] 2 NZLR 547 at [36]-[43].
29 Dame Beverley Wakem Official Information Case Note: Request for EQC Cost Estimates (February 2012).

becomes custodian of it in a particular form and can use it for particular public good purposes. Further, there is great public interest in governments protecting the masses of private information collected about their citizens for government purposes. Release would be outside of those purposes, thus supporting the public interest in restraint. What is more, without a guarantee of protection, the government would be unable to collect this information and therefore to govern.

It is arguable, then, that contrary to what the High Court suggested in the *Krieger* case, both sorts of information did 'relate to' government in a very direct way. There was obvious public interest in restraining such information, and no reason why government should not have been called upon to establish this, in recognition of the fact that it should be rare for a private law claim to be exploited by a public claimant. However, in the event, the burden fell on Mr Krieger to establish the defence, which he was unable to do. It was held there was no public interest in publication of the details of repair work and quotes required for individual Christchurch properties following serious earthquakes. Some members of the public might have a prurient interest in checking the details of their neighbours' properties, but otherwise, public understanding and discussion of government activities was not promoted.[30] Mr Krieger was eventually fined for contempt, which is detailed below.

Difficulties of establishing public interest to defend an application for an interim injunction

In an application to restrain Maori Television from screening a programme disclosing certain credit card use by a publicly funded trust, an interim injunction was granted and initially extended even though it appeared there was an arguable defence based on alleged mis-spending of public funds.[31] This is not uncommon where a court does not have the benefit of full evidence, or cross-examination, as in this case, which was an urgent application. Fortunately, the application was eventually withdrawn. The question then arose whether media could publish the affidavit evidence produced for the application.[32] The court held that there is no general reason why a defendant may not make public reference to affidavit evidence filed in support of a now-abandoned injunction application against it, as long as the evidence has been volunteered as an exhibit to an affidavit rather than obtained under the discovery rules[33] and no non-party has made separate application to protect other confidential or privacy interests.[34]

30 *Earthquake Commission v Krieger* [2013] NZHC 3140, [2014] 2 NZLR 547. See also *Earthquake Commission v Unknown Defendants* [2013] NZHC 708; *Solicitor-General v Krieger* [2014] NZHC 172.

31 *Te Kohanga Reo National Trust Board v Maori Television Service* [2013] NZHC 2490 and 2630.

32 Ibid.

33 Rule 8.30(4) of the High Court Rules requires that discovered evidence can only be used for the purposes of the proceedings.

34 *Te Kohanga Reo National Trust Board v Maori Television Service* [2013] NZHC 2490 and 2630 at [24]-[26].

Privacy

Refusal of interim injunction against media

In 2014, the High Court declined an urgent application for an interim injunction to prevent the publication of an anticipated story in the New Zealand Herald about discord within the intended plaintiff's extended family following the death of her mother.[35] With little evidence before the court and a story that had not yet been written, the intended plaintiff was unable to establish any substantive information that she had a reasonable expectation of privacy in. Accordingly, it followed that suggestions of general discord in the family if published would not be highly offensive to a reasonable person. Against this, the court weighed the Herald's freedom of expression, in a balancing exercise much like that carried out in the UK, and found in favour of the newspaper. The court noted that particularly where there is little knowledge of the content of the intended article, it will be a serious matter to try to injunct media. The standard to be met before such injunctions are granted was referred to as high and was not met in this case, although the judge acknowledged the potential distress and embarrassment of the claimant. Justice Katz commented that the requirements of the tort 'are such that successful claims are likely to be fairly rare.'[36]

However, as discussed under breach of confidence above, in *Slater v APN New Zealand Ltd*,[37] the High Court granted an injunction to prominent blogger Cameron Slater to prevent unknown persons from publishing email correspondence obtained by illegal computer hacking, although media were not prevented from publishing material already held.

Intrusion upon seclusion tort

I referred previously to the ground-breaking High Court decision in *C v Holland* which recognised an action for intrusion upon seclusion.[38] Other High Court decisions in the area are emerging which demonstrate lack of agreement about the development of this tort in New Zealand. In *Faesenkloet v Jenkins*,[39] the tort arose in the context of a neighbour dispute, where the plaintiff objected to the operation of a camera installed on the roof of a garage adjacent to a driveway running to his property. The camera filmed the plaintiff's land and public land and could therefore capture images of people using the driveway although this did not amount to clear images. Justice Asher in the High Court was of the opinion that invasion in the context of the tort could extend to a public place.[40] However, the court then appeared to attempt to push the two New Zealand torts back together by holding that although there is a distinction between unlawful publication of private facts and intrusion into seclusion, it is far from clear that there needs to be different torts

35 *Chatwin v APN News & Media Ltd* [2014] NZHC 11 (20 January 2014).
36 Ibid at [28].
37 [2014] NZHC 2152 and 2157.
38 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.
39 [2014] NZHC 1637.
40 *Faesenkloet v Jenkins* [2014] NZHC 1637 at [37].

for both.[41] Instead, the court focused on what it saw as the common elements of: facts for which there is a reasonable expectation of privacy, and publicity or an intrusion, which would be considered highly offensive to an objective, reasonable person. The court held that the claim failed because there could be no reasonable expectation of privacy given the public ownership and use of the driveway, and on the facts, the intrusion by the camera was not objectively highly intrusive. The plaintiff's claim failed. This attempt to formulate a grand tort may be premature and would be better provided for in statute. Although it could be said that currently, some applications of the publication tort in fact protect against forms of harassment as well,[42] the development of a separate tort of intrusion into seclusion allows for doctrinal clarity and clear denunciation of the particular behaviour that is unlawful. For journalists, that is helpful, because one tort is about editorial judgment and the publication decision, and the other is about newsgathering activity.

More recently, in the *Slater* case,[43] Fogarty J, in the High Court, granted an urgent injunction against unknown persons to prevent publication of hacked emails, and referred briefly to *Holland* as authority demonstrating that courts will respond to novel facts of unwanted invasions of privacy.[44] Computer or phone hacking is analogous to accessing a bank account, which has been recognised in Canada as a form of intrusion into seclusion.[45]

In January 2014, David Bain, a public figure tried twice and acquitted of the murder of his family, was harassed by media which surrounded the site of his private wedding, possibly trespassed, and also took images of it from four helicopters circling during the ceremony.[46] Arguably these actions could have been the subject of an intrusion into privacy claim.

Media exemption from Privacy Act 1993

New Zealand's data protection legislation contains an exemption for media, to the effect that privacy principles do not apply to the media in general in relation to gathering, preparing and broadcasting or publishing news for public broadcast. Section 2 of the Privacy Act 1993 provides:

> Agency does not include in relation to its news activities, any news medium
>
> News activity means—
>
> (a) the gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news or current affairs, for the purposes of dissemination to the public or any section of the public;
> (b) the dissemination, to the public or any section of the public, of any article or programme of or concerning:

41 *Faesenkloet v Jenkins* [2014] NZHC 1637 at [38]- [39].

42 See eg, the 'mundane activities in public places' cases such as *Murray v Express Newspapers plc* [2007] EWHC 1908 and *Weller v Associated Newspapers* [2014] All ER (D) 142 (Apr), [2014] EWHC 1163 and injunction cases like *A v Fairfax New Zealand Ltd*, HC, Wellington, CIV-2011-485-569, 28 and 29 March 2011.

43 *Slater v APN New Zealand Ltd* [2014] NZHC 2157.

44 Ibid at [6].

45 *Jones v Tsige* [2012] ONCA 32, (2012) 108 OR (3d) 241.

46 Stuff website, *David Bain has tied the knot* at <http://www.stuff.co.nz/national/9595893/David-Bain-has-tied-the-knot> (accessed 8 May 2014).

(i) news;
(ii) observations on news;
(iii) current affairs.

A broad approach to the definition has been accepted at High Court level.[47] However, the High Court more recently held that the exception does not apply to a journalist who collected information about a person during interviews carried out for the purpose of research for a book about the person. The journalist was employed by a newspaper but was held to be publishing the book in a private capacity. Further, the journalist was held to be not engaged in a news activity, because the definition refers to the compiling of articles or programmes, not books.[48] Although the case could be confined to special facts concerning discovery procedure, media were concerned about this decision. It appears the definition in the Privacy Act may be too narrow in this respect. I have discussed previously the Law Commission's report on the Privacy Act, which included a recommendation that the definition of 'news media' in the Act be amended to exclude from that exemption media that are not subject to a code of ethics which deals expressly with privacy and includes a complaints procedure. The government has announced it will implement most of the Law Commission recommendations, including giving the Privacy Commissioner more proactive powers to allow the office to order agencies to comply with the law, to provide personal information to requesters where there is no lawful basis for withholding it, and to create a legal responsibility to report material data breaches to the office, and also to report serious breaches to affected individuals.[49] However, the question of the media exemption has unfortunately fallen out of the reform process, just at a time when it appears it should be given full consideration.

Suppression and privacy

It appears information that is the subject of a suppression order could be the basis of a complaint to the Privacy Commissioner. In *Sensible Sentencing Group Trust v the Human Rights Review Tribunal*,[50] the Court of Appeal rejected a judicial review challenge to the power of the tribunal to deal with a complaint about the naming of an individual on the appellant's website as a sex offender. The individual had complained to the Privacy Commissioner that the naming was in breach of an historical suppression order. The existence or otherwise of the suppression order was disputed as the evidence disclosed only an interim order with no evidence as to discharge or otherwise. However, the Court of Appeal held it might be possible for the director of the tribunal to establish that there had been a breach of Privacy Principles 6, 8 and 11 in

47 *Lau v ACP Media Ltd* [2013] NZHC 1165 at [17]-[22].
48 *Dotcom v Attorney-General* [2014] NZHC 1343 at [57]-[77].
49 *Privacy Commissioner Annual Report 2014*, p 9, at <https://privacy.org.nz/assets/Files/Reports-to-ParlGovt/OPC-annual-report-2014-web3.pdf> (accessed 4 December 2014), Ministry of Justice, *Reforming the Privacy Act 1993, Cabinet Paper, 13 May 2014,* at <http://www.justice.govt.nz/publications/global-publications/r/reforming-the-privacy-act-1993> (accessed 15 December 2014).
50 [2014] NZCA 264.

the Privacy Act because an unknown police employee had unlawfully dealt with the personal information by downloading it from the police database and passing it on to the trust.[51]

Official information

Review of legislative regime

The previous update detailed the recommendations of the Law Commission final report on the New Zealand's 30 year old official information regime.[52] The government has responded to the paper, and advised that major legislative reform of the official information legislation will not be progressed. However, it did agree to extending the reach of the OIA to information relating to the administrative functions of the courts. This would not include information about matters before the courts, or the performance and functions of the judiciary. In the meantime, operation of the official information legislation will be kept under review and may be given effect as competing priorities allow.[53]

NZSIS inquiry into official information request

Recent political scandals have involved concerns about political influence in the Official Information regime. The Inspector General of the New Zealand Security Intelligence Service has recently reported on an inquiry carried out as to how a prominent blogger was able to receive an almost immediate response from the SIS to an Official Information request, whereas media had a similar request initially denied and then responded to the following day, thus giving an exclusive story to the blogger.[54] The report found that the SIS had disclosed incomplete, inaccurate and misleading information in response to the Official Information Act requests by the blogger and others, and it had provided much the same information, together with further detail, to the Prime Minister and the Prime Minister's Office. As a result, the then Leader of the Opposition was criticised by the blogger and other commentators and by news media and the Public Service Association. No clarification or correction was provided once the effect of the errors became apparent. The SIS also wrongly failed to treat the media requests for the same information as OIA requests but simply denied them, which effectively allowed the blogger an exclusive news story.

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51 See above p 384 (Privacy Act)

52 *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012).

53 Ministry of Justice, *Government response to Law Commission report 'The public's right to know: Review of the official information legislation'*, 4 February 2013 at <http://www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-the-publics-right-to-know-review-of-the-official-information-legislation> (accessed 15 December 2014).

54 See Cheryl Gwyn Inspector-General of Intelligence and Security, *Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011*, 25 November 2014 at <http://www.igis.govt.nz/assets/FINAL-REPORT-INTO-THE-RELEASE-OF-INFORMATION-BY-NZSIS-IN-JULY-AND-AUGUST-2.pdf> (accessed 5 December 2014) . See also N Hager, *Dirty Politics*, Craig Potton Publishing, Nelson, 2014, Ch 3.

Therefore the SIS process for handling OIA requests was inadequate and there was a mistaken understanding of OIA obligations, particularly in relation to the need for consultation with the Leader of the Opposition as to the accuracy of the information to be disclosed and whether and how to release that information. Further, the SIS did not have appropriate processes and protocols for the maintenance of security and political neutrality in its relationship with the Prime Minister's Office. Among other things, the Inspector recommended that the SIS should provide an apology to the then-Leader of the Opposition, the Hon Phil Goff. The report has caused some disquiet as to the potential for political misuse of the OI regime.

Regulation of the media

Regulation in the new media age

I referred in the last update to the Law Commission paper – 'the News Media Meets New Media', released in March 2013,[55] where the Commission recommended that the current complex system of media regulation be replaced with one over-arching regulator with incentivised 'voluntary' membership. The government agreed to implement the cyberbullying recommendations in the report,[56] but later rejected the recommendations for a new super-regulator. Minister Judith Collins said that unlike recent reviews in the UK and Australia, the Law Commission's report was not driven by a crisis of confidence in the mainstream media, and she thinks the media in New Zealand have already made good progress in dealing with various challenges. Perhaps influenced by regulatory standoffs between government and media overseas, the New Zealand government has concluded there is no pressing need for statutory or institutional change currently. This is unfortunate, as we now have three different regulatory bodies dealing with speech harms, each based on different codes, standards, principles or elements of liability. This system is likely to be further complicated when the Harmful Digital Publications Bill is passed and a further regulatory system based on a mediating agency with recourse to the District Court is put in place for online speech only. One comprehensive regulatory body dealing with all harmful speech would be easier for the public to locate, and one standard complaints process based on a single code of practice would be far more accessible than currently. While it is certainly true that it is much more difficult to get agreement and buy-in to grand regulatory schemes from the stakeholders involved, in the long run, they give greater coherence, fairness and efficiency to the law.

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55 New Zealand Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age (NZLC R128, 2013)* at <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media?quicktabs_23=report> (accessed 14 June 2014).

56 See Scoop website, *Time's Up For Cyber Bullies* at <http://www.scoop.co.nz/stories/PA1304/S00048/times-up-for-cyber-bullies.htm> (accessed 14 June 2013) and the Harmful Digital Communications Bill 2013, 168-2, <http://www.legislation.govt.nz/bill/government/2013/0168/latest/resultsin.aspx?search=sw_096be8ed80e2ec61_Maori_25_se&p=>1> (accessed 15 December 2014).

Court reporting

Developments in access to court records

Access to court records is dealt with in New Zealand in two sets of rules. There are three underlying principles for the rules. First, prior to judgment or verdict, allegations made in pleadings and indictments are unproven and permission of the court should be required where non-parties seek access to ensure parties are protected from publication of statements that may ultimately be found to lack substance. Secondly, during committal, at trial or at full hearing, open justice should be given effect by a generous and responsive approach, to enable media to perform their legitimate functions of reporting court proceedings. Thirdly, the verdict or judgment is the formal and definitive record of the decision of the court. Access to other material by non-parties, such as excluded evidence, requires permission of the court.

The criminal jurisdiction is covered by the Criminal Procedure Rules 2012,[57] while the civil jurisdiction is covered by the High Court Rules 2009.[58] The first decision reported under the 2012 criminal rules was declined.[59] In two applications, media sought access to a psychologist's report, and to all documents on the present court file, prior to completion of the trial. Both applications were declined, the first because the psychologist's report contained much confidential material and the second, very broad application, because there was other confidential material throughout the file. Unfocused, fishing expedition applications of this kind are unlikely to succeed. The judgment also indicates that media arguments that access to the file is needed in order to report on the case immediately after the trial are unlikely to be persuasive. A similar approach is taken by the Court of Appeal, which draws on the High Court Rules to inform its decisions on non-party access to documents filed in that court.[60]

In civil proceedings involving an international trade dispute, Radio New Zealand, the Wall Street Journal and an Australian based reporter from Bloomberg News sought a copy of a statement of claim or access to the court file in litigation that had only just been filed.[61] The plaintiff did not object but the defendant did. The judge took the prevailing New Zealand approach where open justice is not paramount but is considered as one of six factors to be dealt with in a non-hierarchical fashion.[62] Although there had been considerable publicity about the events leading to the litigation, a stay of proceedings was currently being considered and this meant none of the court documents containing the parties' positions and arguments might ever see the light of day.

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57 Criminal Procedure Rules 2012, Part 6, Access to court documents, Rules 6.1-6.10, (called Criminal Rules).

58 High Court Rules 2009, Part 3, Subpart 2, Access to court documents, Rules 3.5-3.16 (called Civil Rules).

59 *Chief Executive of the Department of Corrections v Robertson* [2014] NZHC 1526 and *Chief Executive of the Department of Corrections v Robertson* [2014] NZHC 1621.

60 *Patterson v Commissioner of Inland Revenue* [2013] NZCA 4, [2013] NZAR 136; *Schenker AG v Commerce Commission* [2013] NZCA 114. The court has its own rules: the Court of Appeal (Access to Court Documents) Rules 2009.

61 *Danone Asia Pacific Holdings PTE Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 393.

62 *Schenker AG v Commerce Commission* [2013] NZCA 114.

A potential arbitration process could be placed in jeopardy by disclosure. Open justice therefore had less significance where the dispute might not ever be heard by the court. The court concluded that the release of more detailed information outside of what was already in the public arena could await the statement of claim and of defence in the event the dispute was heard by the court.

In *Rice v Heaney*[63] a business publication, the National Business Review, sought access to a proceedings file involving matters relating to the dissolution of a partnership, and argued that full and accurate reporting required access because one of the parties was a partner at a firm which was paid ratepayers' money through work for a council on leaky buildings. Access was refused due to the early stages of the proceedings, the presence on the file of commercially sensitive and private information, the possibility that publication would threaten any prospect of extra-judicial resolution, and the intrinsically private nature of the dispute, which did not actually affect the council or ratepayers. Access to the file was refused although a minute dealing with procedural and timetable directions was made accessible.

The Human Rights Review Tribunal, which has adopted the civil rules for its proceedings, allowed an application from a New Zealand Herald journalist for access to the tribunal's file during proceedings arising from a complaint about a breach of privacy.[64] However, in that case, neither party objected to the application for access. Copying of documents disclosed in an interim hearing well-attended by media was also allowed, to be charged on an actual cost basis and carried out under court supervision. Media access was also not to inhibit access to the court file by the tribunal, and media were required to observe existing suppression orders.

Filming in court — In-court media guidelines

Media guidelines are currently being reviewed following publicised concerns from the Criminal Bar,[65] and a consultation paper has been issued.[66] It does not appear major change is required to the Guidelines, though informed fine-tuning may be useful. However, while this review was going on, behaviour of TV3 during the filming of a prominent trial demonstrated how the Guidelines can be abused in a way that is not fair and balanced reporting.[67] During the trial of the Honourable John Banks on a charge connected with a false electoral expenses return, Justice Wylie withdrew filming rights and ordered TV3/Mediaworks not to use any footage captured in the courtroom in its coverage of the balance of the trial. These orders were made because TV3 had broadcast footage obtained in court on its evening news programme

63 [2014] NZHC 1311.

64 *Director of Human Rights Proceedings v The Sensible Sentencing Group Trust* [2013] NZHRRT 20.

65 See C MacLennan, *Cameras keep court an open book*, NZ Herald, 4 April 2014, at <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11231712> (accessed 20 May 2014).

66 See Courts of New Zealand, *In-Court Media Coverage – a consultation paper*, 6 March 2014, at <http://www.courtsofnz.govt.nz/In-Court-Media-Review/In-Court-Media-Coverage_-_consultation-paper_.pdf> (accessed 20 May 2014).

67 *R v Banks* [2014] NZHC 1155.

appearing to show Mr Banks placing one of his fingers in his ear, removing his finger from his ear, looking at his finger and then putting his finger in his mouth. Although Mr Banks did not complain, the judge considered the broadcast was a 'sideshow broadcast seemingly to entertain' and was intended to expose Mr Banks to ridicule and/or derision. Further, it had no news value and lacked any public interest.[68] The camera had been recording at a time not within the guidelines and was being operated by TVNZ although no film had been broadcast by TVNZ. TV3 was held to be in breach of the guidelines and lost any further right to broadcast film from the trial. This incident did not reflect well on the media involved. The judgment of the court was ultimately referred to the Guidelines Review Committee.

Suppression orders

Blanket suppression orders

In 2014, the High Court in Christchurch made rare orders at a sentencing hearing suppressing almost all details of the victims of a murderer and their families. This included the summary of facts concerning the rape and murder, and the name of the victim, and the victim impact statement read in court and the others handed to the judge. The grounds were undue hardship arising from invasion of privacy.[69] Victims had been approached by media and made it clear at the sentencing they did not want to give interviews. Media have indicated they will seek to have the orders reviewed.

Requirement to establish extreme hardship

Extreme hardship is required before discretion is exercised in favour of name suppression. In *R v Wilson* involving a 17 year old offender whose mental health was at risk, the matter was finely balanced. However, ultimately the youth of the defendant, impact on her rehabilitation and predicted significant emotional distress did not reach the threshold in the context of a serious blackmail offence.[70] In another case following conviction for theft as a personal servant, the first limb was not satisfied, even though the appellant's surname was rare and her son was readily identifiable and could be the target of further teasing and bullying behaviour at school. No professional report about the son's state had been put before the court.[71] In *X v Police*,[72] however, the court found that publication of the name and address of the appellant would cause extreme hardship to his wife and their three young children, the wife having just given birth in stressful circumstances and the children being extremely young. This was so even when, when the second limb of the test

68 *R v Banks* [2014] NZHC 1155 at [33].

69 *R v McDonald* [2014] NZHC 2054. See The Press, *Murderer Aaron McDonald is jailed for 21 years*, at <http://www.stuff.co.nz/the-press/10431938/Murderer-Aaron-McDonald-is-jailed-for-21-years> (accessed 28 August 2014).

70 *R v Wilson* [2014] NZHC 32. Justice Whata suggested that the reporting of the matter must be careful to accurately record Ms Wilson's culpability and acknowledge her youth, and that the value placed on open reporting is undermined by even the slightest hyperbole and the unfair harm caused by it: [47].

71 *Rougeux v Police* [2014] NZHC 979. See also *RM v Police* [2012] NZHC 2080; *K v Inland Revenue Department* [2013] NZHC 2426.

72 *X v Police* [2014] NZHC 935.

was applied, the hardship to the wife was weighed against the benefit of open reporting in the context of sexual offending against children.

Inherent power to suppress

The existence of an inherent power in criminal cases to suppress names and evidence has been examined exhaustively recently by the Supreme Court, which found by majority that it definitively exists in a case involving publication of a suppressed judgment on a website.[73] This power is referred to as an inherent power to make non-party suppression orders. In the case itself, an entire judgment had been suppressed in order to protect the right to a fair trial. The court observed that the power to bind non-parties by suppression may cover judgments and things such as evidence which one party wants to adduce but which has been held inadmissible, and facts such as a defendant's prior criminal record.[74] Although the case involved the previous law, the court also commented on the Criminal Procedure Act regime and the relationship of the new provisions with the inherent powers. It noted that the new scheme is not a code and so has not ousted any inherent power, except perhaps to the extent that the newly specified grounds for exercising the discretion under the Act might do so.[75] In the same case, the Supreme Court made it clear courts have an inherent power to make non-party suppression orders in civil proceedings, although it emphasised that what is being referred to is the inherent power of the court rather than inherent jurisdiction.[76] In *Ridge v Parore*[77] the High Court held that the parties had an onus of establishing that there were exceptional circumstances relating to them, personally, that could displace the principle of open justice to allow suppression of their names in a civil proceeding. APN New Zealand Ltd, which was seeking to set aside a very broad suppression order, was successful in relation to the parties' names. However, the court allowed the continued suppression of information identifying the celebrity couple's children and sensitive financial information.

Individual responsibility

It is clear courts are reluctant to convict media, but wish to encourage responsibility where possible. In March 2014, Fairfax media was convicted and fined $2250 for breach of a suppression order made by a coroner. The editor of the Waikato Times was also charged, but was granted a discharge

73 *Siemer v Solicitor-General* [2013] 3 NZLR 441.

74 Ibid at [146].

75 Ibid at [137(d)] and [169], referring to ss 200, 202 and 205 of the Criminal Procedure Act 2011. The statutory power to clear the court has specifically ousted the inherent power, however: Criminal Procedure Act 2011, s 197(4).

76 Ibid at [113] and [173(d)]; *Siemer v Solicitor-General* [2012] 3 NZLR 43. See also *Mafart v Television New Zealand* [2006] NZSC 33, [2006] 3 NZLR 18 at [16] and *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA). In *Norsworthy v Police* [2013] NZHC 2550, an application for suppression of the appellant's connection with an ongoing police investigation where no charges had yet been laid was dealt with under the inherent power but was declined.

77 [2013] NZAR 1355.

without conviction and ordered to pay $500 to the subject of the order for the emotional harm the breach had caused.[78]

Contempt

Contempt liability and hyperlinking

In *Solicitor-General v Krieger*[79] a contempt application filed by the Solicitor-General arising from a civil proceeding initiated by the Earthquake Commission against Mr Krieger was successful. The Earthquake Commission had obtained an interim injunction and subsequently a permanent injunction restraining disclosure of information in a spreadsheet inadvertently sent by it to another person. Mr Krieger received a copy of the spreadsheet and deliberately provided internet access to the contents by providing a hyperlink. In deciding whether there can be liability for contempt by third party publishers, the court held the issue is to be assessed in a manner similar to assessing participation in a crime. Where a clearly expressed prohibition exists, the evaluation of an alleged breach is to be robust and reflect the practical reality. The issue is therefore one of causation. Here, contempt was found because Mr Krieger's publication of the hyperlinks in fact facilitated disclosure of the spreadsheet. Further, the fact that all, or some, of the websites were overseas was irrelevant, as disclosure of the information occurred in New Zealand when EQC claimants downloaded it. Mr Krieger was fined $5,000.

Sub judice contempt

In the last update, I noted the government referred a wide-ranging review of New Zealand's contempt laws to the Law Commission. The Commission has issued an interim report[80] and reached a preliminary view on sub judice contempt that some change is needed because there are significant conceptual and practical problems in applying the current real risk test and reasoning in the age of the internet, and there is lack of clarity around the threshold for contempt. The Commission proposes a very specific statutory approach to these issues. The first part would be a new statutory provision prohibiting the publication or reporting of a defendant's previous convictions and any concurrent charges during a specified period leading up to the trial for an offence unless an order is made by the court permitting publication. (It would be a statutory offence to breach the provision.) The Commission thinks this sort of information is almost always prejudicial and interferes with the courts' authority to decide what evidence should be admissible. However, it would leave an exceptional power to allow publication where, for example, there is no real risk. The Commission goes on to suggest a statutory provision under

78 Stuff website, *Fairfax fined for suppression breach*, 26 March 2014, at <http://www.stuff.co.nz/national/9871017/Fairfax-fined-for-suppression-breach> (accessed 28 May 2014).

79 [2014] NZHC 172. See also *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Earthquake Commission v Krieger* [2014] 2 NZLR 547, discussed under breach of confidence above.

80 *Contempt in Modern New Zealand*, LCIP 36, May 2014.

which a court could suppress any other information during the period leading up to a trial if satisfied that suppression of that information is necessary to protect a person's right to a fair trial. (It would be a statutory offence to breach a suppression order.) This would basically put what exists now into a statute. Further, a statutory offence that would cover any publication that (regardless of whether it also breached the previous provisions) created a real risk, as distinct from a remote possibility, of interference with the administration of justice by prejudicing a fair trial, is proposed. The courts would have discretion to define the limits of the test in the unique circumstances of each case. It is hard to see how this adds anything new to the existing law, or makes it more certain. The new statutory provisions would also include a system providing for take-down orders where a publication breached one of the provisions.

Scandalising the court

In relation to scandalising the court, the Commission is inclined to get rid of this version of contempt as a relic of a previous age. However, it does ask whether some sort of statutory offence should replace it, though hints that it feels there are plenty of ways individual judges can seek recourse if attacked in an extreme manner, for example, by using defamation and the proposed Harmful Digital Communications legislation. I agree with this approach.

Contempt and jurors

As to contempt and jurors, the Commission discussed jurors using the internet and looking for other evidence, and also the effects of pre-trial evidence. If jurors have been instructed not to use the internet and are found to have done so, this is a statutory contempt under s 365 of the Criminal Procedure Act. The Commission surveyed NZ jury-warranted judges about their experience with jurors. Twenty-nine per cent of those responding thought it had happened once or twice though 58% thought not at all. The Commission thought this showed the issue was not unduly problematic. It suggested some things could be done to improve the situation, however, for example, there might be a more interactive approach to empanelling where useful. Further, the idea of explaining to potential jurors what the case is about and asking them to withdraw if they have bias is floated. This has been used in high profile cases in NZ already. The Commission questioned the effectiveness of 'do not research' directions and suggested instead that written instructions for jurors to keep may be more effective, including clear instructions on why they should not research. Other suggestions made include instructions to be given by all judges, not just as a discretion, and the inclusion of an instruction in the oath. It should be made clearer to jurors they can ask questions during the trial, and better presentation of evidence in court should be mandated, in particular, better use of technology. However, sequestering was not supported.

The Commission favours an offence of undertaking research, with a maximum 3 months imprisonment and a requirement for intention and judge-alone trials where risk is significant. As to jurors disclosing deliberations, the Commission proposes a statutory offence for anyone to disclose or publish details of a jury's deliberations or for anyone to solicit the

information. There is a suggested defence for disclosure in the interests of justice, though it is not clear whether this should be narrowly or broadly drawn. A final report and recommendations are to be published in 2015.

Broadcasting Standards Authority

Introduction

In its 2014 Annual Report, the BSA notes it received 149 complaints, compared to 138 in the previous year.[81] It issued 99 decisions in the 2013/14 period and upheld only 12% of complaints. This compares to 16% in 2012/13. Both are much lower rates generally than the near 27% upheld for the 2011/12 period.[82] The Authority held its first ever oral hearing for a complex complaint and the decision is awaited. The trend in the decisions made by this Authority of upholding complaints but not imposing a penalty has continued, with half of the decisions for the 2013/14 period being upheld with no order.

Private facts do not have to be true

In a recent decision, the Authority held that private facts do not actually have to be facts.[83] Therefore, as with the privacy tort, information covered by the broadcasting regime can be private, whether it is true or not. Further, the public arena is now taken to include publication on social media sites.[84]

Secret filming still risky

A Close Up item used secret film of a New Zealand doctor offering an experimental stem cell treatment to people with Multiple Sclerosis.[85] The Authority agreed the doctor had been treated unfairly because he was not given a fair opportunity to comment. Privacy was breached by use of the hidden camera. The broadcaster could not show a public interest defence outweighed privacy because it had not retained the raw footage from the consultation. Legal costs of $5,500 were imposed as a penalty.

Reality programming and use of old footage

A man was filmed on his property over a fence eight years ago during production of a reality television show about neighbour disputes. He responded by giving one finger, which was captured on film and the footage was used in the programme although he did not otherwise take part. Although the man made it clear he wanted nothing to do with the programme, the footage was used in an opening montage for the fourth series of the programme in 2009, and that series was repeated in 2010 and 2013. The man complained directly to the Authority.[86] The Authority held that the camera crew's actions amounted to an intrusion in the nature of prying with the

81 Broadcasting Standards Authority, Annual Report 2014, p 16.
82 Broadcasting Standards Authority, Annual Report 2011, p 11.
83 *Hill v Radio One* BSA 2013-074.
84 *Middleton v TVNZ* BSA 2013-040.
85 *Dr Z v Television New Zealand Ltd* 2012-074.
86 *TJ and Television New Zealand Ltd* 2013-092.

complainant's interest in seclusion. Whether or not he knew of the filming and of the planned broadcast, his body language and letters sent to the broadcaster made it quite clear he did not want his image to be used. The filming and the broadcast was a highly offensive intrusion because he made it clear he did not consent repeatedly. An award of $1,000 compensation was made to the complainant.

The risks associated with satirical news

Presenters of what is described by the Authority as a 'new type of current affairs and entertainment programme' using comedy and entertainment techniques, made comments about Colin Craig, the leader of the Conservative Party, which attracted complaints on the grounds of good taste and decency, accuracy, law and order, controversial issues, fairness, discrimination and denigration, responsible programming and violence (almost all possible grounds of complaint excepting children's interests and liquor!).[87] Two broadcasts were involved, one was a skit that lampooned Mr Craig's views on same-sex marriage, and the other focused on him personally. The Authority noted that there is a higher threshold for breach of fairness where public figures are involved. The first broadcast was found to be possibly offensive to some but not unfair. The second broadcast, however, contained some comments which were sustained personal abuse masquerading as satire, such as 'I think Colin Craig is a nutcase; I feel Colin Craig is a doofus; I believe Colin Craig is a smarmy rich prick', which had no bearing on Mr Craig's political views. These comments were found to be unfair. No other grounds for the complaint were upheld.

Press Council

Introduction

From mid-2013 the Press Council has had a new chair, Sir John Hansen, a retired High Court judge. The Council received 142 complaints in 2013 compared to 157 for the previous year. It issued decisions on 61 complaints in the 2013 year, five less than the 76 decisions in the 2012 year.[88] The uphold rate for 2012 was 28%, which is high for the Press Council but similar to the year before. However, in 2013, the uphold rate dropped rather dramatically back to 18%. The Council has stated in the past that it wished to mediate more complaints. However, in 2012 it mediated or resolved 6% of complaints and in 2013, even less, at 4%. In March 2014, the Press Council announced it was opening membership to bloggers and taking on more extensive powers.[89] A new form of membership has been available since May 2014 to non-newspaper digital media, conditional on agreement to the same conditions as apply to current members. A new fee structure is based on the size of the digital entity and its commercial or non-commercial status.

87 *Craig v Television New Zealand Ltd* 2013-034.

88 Forty-first Report of the New Zealand Press Council, 7.

89 New Zealand Press Council, *NZ Press Council to extend coverage, gain new powers*, 27 March 2014, at <http://www.presscouncil.org.nz/articles/Press_Council_-_Press%20statement_230314.pdf> (accessed 11 December 2014).

Member websites must have a clear complaints process and advice about the possibility of complaint to the Council. The Council also has powers to censure and order take-down of material. These changes have been made in part to respond to the Law Commission report on new media and to the government response to that report rejecting the recommendations but stating an expectation that existing forms of media self-regulation would continue to adapt to digital media.[90]

Inaccuracy, discrimination

An ill-judged inflammatory news story was published in the Press newspaper in 2013 about the increase in chlamydia in the Canterbury region since 2011. The headline of the article was 'Luck of the Irish has downside in sex-disease stats.' The introduction read 'Irish workers helping with the rebuild [after the Canterbury earthquakes] are sharing the love but it seems they may also be helping to spread sexual disease.' The article was illustrated by a cartoon showing two men in green coats approaching a doorway with a sign for the STD Clinic from which came a song 'If yer Irish come into the parlour.' The Council found the article to be inaccurate as the statistics did not support the message about the Irish, and discriminatory, as was the cartoon.[91] Although cartoons have some leeway in terms of being opinion with more licence to offend, in this case the cartoon illustrated a serious (and inaccurate) news item and was therefore treated according to the same standards as the news article. The Council also noted its disapproval of the behaviour of the journalist in responding in a flippant and rude manner to complaints about the article on Twitter.

Hyperbole, headlines and women's magazines

Headlines, sub-headings and captions should accurately and fairly convey the substance or a key element of the report they are designed to cover.[92] In a 2006 decision, *Trina Stevens v Women's Day*,[93] the Council upheld a complaint that a headline on the cover of an edition of Women's Day was misleading. The two large headlines stated: 'POSH pregnant AGAIN!' and 'JEN'S PREGNANT!' over photographs of Victoria Beckham and Jennifer Aniston. A circle enclosing the words 'SHOCK BABY NEWS' accompanied the material relating to the latter. The articles about each celebrity inside the magazine made it clear the statements were speculation, not fact. The Council upheld the complaint by a majority of seven, which, while recognising freedom of expression and accepting that some latitude might be given to escapist stories about celebrity figures and some licence for inventiveness to headline and caption writers, thought it would be going too far to allow the making up of claims in headlines which were not substantiated by the copy inside the publication. However, the minority of four thought the principle of accuracy simply had no application to this sector of the media and that the market

90 See *The News Media Meets 'New Media'*, LC R128, (2013).
91 Case Numbers 2354-2357, *Smyth et al v the Press*.
92 New Zealand Press Council, *Statement of Principles*, Principle 6, at <http://www.presscouncil.org.nz/principles_2.php> (accessed 12 December 2014).
93 Case No 1060, *Trina Stevens v Woman's Day* (2006).

would provide a solution because unhappy readers could simply cease buying the magazine. This view now appears to predominate in the Council, which has rejected a recent similar complaint.[94] A headline which said 'R-Patz & Katy's Wedding Shock' on the cover of Woman's Day magazine of June 2013 was complained about as misleading. The article dealt with relationship issues of celebrity couple Katy Perry and Robert Pattison and contained nothing to substantiate the teaser in the headline. The majority of the Council took the position of the minority in the 2006 decision, that the article was clearly gossip, which by its very nature, can be ambiguous or mislead. Furthermore, the majority thought that if the article was misleading its readers, they were accepting of the possibility, since the nature of such magazines is well known. In other words, no one takes such magazines too seriously, so the ordinary stringencies do not apply. Thus women's magazines appear to have dropped out of the jurisdiction of the Press Council whether they belong or not.

Gratuitous reference to ethnicity

The Council has upheld a complaint that an article discussing a rape trial and conviction gratuitously referred to the guilty defendants as 'Fijian Indians'.[95] The article gave no context to the ethnic label and as such, placed unnecessary emphasis on the matter of race. It breached Principle 6 which recognises that race may be the subject of legitimate discussion when relevant and in the public interest.

Online Media Standards Authority (OMSA)

New Zealand's new online regulator has extended its membership to include new media. Any media proprietor who publishes news and current affairs content online can apply to be a member of OMSA.[96] The media proprietor must be an individual or organisation which carries on activities aimed at a public audience online.[97] The current members of OMSA are: Television New Zealand Limited, MediaWorks TV Limited, MediaWorks Radio Limited, Maori Television Services, Sky Network Television Limited, The Radio Network Limited, Radio New Zealand Limited, and two bloggers, David Farrar (kiwiblog) and the controversial Whale Oil Beef Hooked, otherwise known as Cameron Slater.[98]

Settled complaints

Most complaints made to OMSA have been declined at the threshold entry level by the chair. However, of note is *Mitchell v Television New Zealand*,[99] which is an example of how OMSA sees itself as being involved in 'settling'

94 Case No 2339, *Heatherbell-Brown v Woman's Day* (2013).
95 Case No 2332, *Joris de Bres v Waikato Times* (2013).
96 Online Media Standards Authority, Fifth Schedule, <www.omsa.co.nz/constitution/current-membership> (accessed 1 November 2014).
97 Online Media Standards Authority, OMSA membership application form, at <http://www.omsa.co.nz/wp-content/uploads/OMSA-Membership-Application-Form-2014.pdf> (accessed 12 December 2014).
98 http://www.omsa.co.nz/constitution/current-membership/ accessed 12 December 2014.
99 [2014] NZOMSA 2 (7 February 2014).

a complaint. Here the chairman noted OMSA had referred the complaint to TVNZ for a response to a complaint where an inaccurate photo accompanied a story 'Malaysia church attacked by firebombs'. TVNZ acknowledged there was a possible breach of Standard 1 Accuracy and removed the photo and included a note on the story advising the photo had been removed and why. These self-regulatory actions meant there was no further benefit in placing the matter before the Complaints Committee as the material of concern had been removed. The chairman found there was no actual inaccuracy in the article involved. Therefore the chairman determined the complaint was settled.

First full decision of Complaints Committee - accuracy

One of the few decisions to reach the Complaints Committee, *Munro v Radio New Zealand*,[100] concerned Standard 1 Accuracy. The complainant argued that the opening sentence of an article titled 'Labour Confident of strong Party list' based on a broadcast interview which stated that 'The Labour leader, David Cunliffe says his party hopes to get at least 34 per cent of party vote and six new MPs into Parliament in the election,' was inaccurate as it put words into the mouth of the interviewee that were never said and denied on the spot. Radio New Zealand considered this was reasonable paraphrasing and the sentence did not compromise audience understanding that David Cunliffe referred to obtaining a possibly higher proportion than 34% of the party vote. The minority of the Committee was of the view that the sentence was not an accurate representation as required by Standard 1 and guideline 1(b). However, the majority ruled the sentence did accurately reflect and paraphrase David Cunliffe's statement and did not meet the threshold to breach the code. It considered the sentence was unlikely to be misinterpreted by an online reader.

Investigation and interview

Search of newsrooms

In the last update, I noted that New Zealand has a new Search and Surveillance Act,[101] based on recommendations made by the Law Commission in 2007.[102] The regime is under challenge already by journalist Nicky Hager, whose best-seller book, *Dirty Politics*, was published in 2014 just prior to an election. The book was based on numerous emails and other social media exchanges between blogger Cameron Slater and others, which Hager received unsolicited from an unknown hacker. Following a complaint by Slater about the stolen information,[103] police executed a warrant search of Hager's home which took place over 10 hours while he was away, although he had been advised of the search and had stated there was nothing on the premises relevant to the warrant. Nonetheless, a great deal of information in various forms was removed by police. Hager immediately

100 [2014] NZOMSA 6 (2 July 2014).
101 2012, No 24.
102 NZLC R97, Search and Surveillance Powers, 2007.
103 Slater's application for an interim privacy injunction is discussed under Privacy, above.

claimed source confidentiality in the information and this issue will eventually be tested in court under the search and surveillance legislation, which provides a process whereby all the seized material is preserved and delivered to a court until the matter can be determined.[104] Hager and his legal team are also seeking judicial review of the search, claiming the warrant was unlawful.

104 Search and Surveillance 2012, ss 136, 146, 147.